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CHARLES E. ...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 257.

JAY C. HORMEL,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Point III of respondent's brief (pp. 21 to 27), in reply to Point II of our main brief (p. 9), is devoted to an argument that the judgment of the Circuit Court of Appeals should be sustained on the theory that this income is taxable to the grantor under Section 167 (a) (2) of the Revenue Act of 1934 reading as follows:

"(a) Where any part of the income of a trust—

* * * * * *

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest

> in the disposition of such part of the income, be distributed to the grantor;
>
> * * * * * *
>
> then such part of the income of the trust shall be included in computing the net income of the grantor."

In effect respondent's argument may be summarized as follows:

(1) That this Court should hold that the above quoted words "distributed *to* the grantor" are ambiguous and were intended to mean something like the following:

> "distributed *to or for the benefit of* the grantor, and the burden shall be on the grantor to come forward with affirmative evidence in the case of all trusts where the beneficiary is a member of the grantor's family to show that payments to such beneficiary were not for the benefit of the grantor."

(2) That the taxpayer should have volunteered evidence to prove that the income from these trusts was not actually applied by the guardian directly or indirectly (and unlawfully) for the taxpayer's benefit, notwithstanding that the stipulation of facts was framed only in the light of Section 166 and that the Government's contentions under Section 167 were first presented in its reply brief before the Board after the hearing on the merits (R. 1, 2). The fact that the taxpayer's net income exceeded $100,000 in each of the years 1934 and 1935 (R. 7, 11), exclusive of the trusts, may furnish some indication as to what the evidence would have disclosed regarding support of the children by the taxpayer, had the point actually been litigated.

(3) That if the guardian had applied the income for the benefit of the taxpayer, in violation of the guardian's duty under the Minnesota statute (our main brief, pages 10-11), the income should be taxable to the taxpayer to the same extent as if the original trust indenture had contemplated such action.

Respondent's argument seems to bear its own refutation.

The cases cited by respondent (brief, p. 22) were decided upon the theory of "substantial ownership" advanced by respondent in support of his argument herein under Section 22 (a) and were not cases involving Section 167. One is tempted to suggest that the argument above referred to is made solely to bolster what we conceive to be the weakness of respondent's position that the court below properly considered and decided questions arising under Section 22 (a). We submit that the last sentence in respondent's brief in which it is stated that the point need not be considered if the Court agrees with respondent that the grantor is taxable under Section 22 (a) lends support to this suggestion.

Our position is that Section 167, like Section 166, is unambiguous, and cannot be construed to cover a broader field than is indicated by its explicit language. In *Helvering* v. *Wood*, 309 U. S. 344, the Court states (p. 347):

> "The problem of interpretation under §166 is therefore quite different from that under §22 (a). The former is narrowly confined to a special class; the latter by broad, sweeping language is all inclusive. *Helvering* v. *Clifford, supra.* Accordingly, the wide range for definition and specification under the latter is lacking under §166. *And so far as §166 is*

concerned no apparent or lurking ambiguity requires or permits us to divine a broader purpose than that expressed.'' (Italics ours.)

This language, we submit, applies equally to Section 167 of the same Revenue Act.

February, 1941.

Respectfully submitted,

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